NO. 42657-9-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

GAIL DAVERN, an unmarried person,

Respondent

vs.

TIM LIDDIARD and KRISTIN A. SHAUCK,
husband and wife,

Appellants.

APPELLANTS' REPLY BRIEF

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APRIL 18, 2012

TABLE OF CONTENTS

A. REPLY TO INTRODUCTION..... 1

B. REPLY TO COUNTERSTATEMENT OF ISSUES..... 2

C. REPLY TO COUNTERSTATEMENT OF THE CASE..... 3

D. REPLY TO DAVERN'S SUMMARY OF ARGUMENT..... 7

E. REPLY TO DAVERN'S ARGUMENT..... 7

1. DAVERN'S CLAIMS WERE FILED AFTER THE STATUTE OF LIMITATIONS EXPIRED..... 15

2. DAVERN'S ARGUMENTS ON APPLICATION OF CIR/MERTRICIOUS RELATIONSHIP LAWS IS INAPPOSITE..... 18

3. IF THE JVA IS NOT ENFORCEABLE, OREGON LAW IS NOT RELEVANT..... 21

4. THE AWARD OF ATTORNEY FEES WAS IMPROPER..... 22

5. DAVERN IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES ON APPEAL..... 24

F. CONCLUSION..... 25

TABLE OF AUTHORITIES

Table of Cases

Washington Supreme Court Cases

Adams v. King County, 164 Wn.2d 640, 192 P.3d 891, 900 (2008)..... 20

Alaska Banking & Safe Deposit Co. v. Simmons, 67 Wn. 673, 122 P. 319 (1912)..... 16

Carstens v. Earles, 26 Wn. 676, 67 P. 404 (1901)..... 16

Dill v. Zielke, 26 Wn.2d 246, 173 P.2d 977 (1946)..... 15

Good Hope Farms, Inc., 35 Wn.2d 777, 215 P.2d 425 (1950)..... 15

Herberg v. Swartz, 89 Wn.2d 916, 578 P.2d 17 (1978)..... 21

Hyrkas v. Knight, 64 Wn.2d 733, 393 P.2d 943 (1964)..... 15

In re Marriage of Elam, 97 Wn.2d 811, 650 P.2d 213 (1982)..... 14

In re Marriage of Hadley, 88 Wn.2d 649, 565 P.2d 790, 792 (1977)..... 10

In re Marriage of Pennington, 142 Wn.2d 592, 14 P.3d 764 (2000)..... 7

John R. Hansen, Inc. v. Pacific Intern. Corp., 76 Wn.2d 220, 455 P.2d 946, 951 (1969)..... 15

Leinweber v. Leinweber, 63 Wn.2d 54, 385 P.2d 556 (1963)..... 21

Lightner v. Balow, 59 Wn.2d 856, 370 P.2d 982 (1962)..... 20

Malnar v. Carlson, 128 Wn.2d 521, 910 P.2d 455, 459 (1996)..... 16

Moeller v. Good Hope Farms, Inc., 35 Wn.2d 777, 215 P.2d 425 (1950)..... 15

Paulson v. McMillan, 8 Wn.2d 295, 111 P.2d 983 (1941)..... 16

Rocha v. McClure Motors, Inc., 64 Wn.2d 942, 395 P.2d 191 (1964)..... 15

State v. Adams, 107 Wn.2d 611, 732 P.2d 149 (1987)..... 20

State v. Martin, 137 Wn.2d 149, 969 P.2d 450 (1999)..... 14

State ex rel. Foley v. Superior Court, 57 Wn.2d 571, 358 P.2d 550 (1961)..... 15

Vasquez v. Hawthorn, 145 Wn.2d 103, 33 P.3d 735 (2001) 7, 9, 10

Whitney v. Seattle-First National Bank, 90 Wn.2d 105, 579 P.2d 937 (1978)..... 9

Wilson v. Steinbach, 98 Wn.2d 434, 656 P.2d 1030 (1982)..... 13

Washington Court of Appeals Cases

Carson v. Willstadter, 65 Wn.App. 880, 830 P.2d 676, 678 (1992)..... 21

In re Long and Fregeau, 158 Wn.App. 919, 244 P.3d 26, 31 (Wn.App. Div. 3, 2010)..... 14

In re Marriage of Lindemann, 92 Wn.App. 64, 960 P.2d 966 (1998)..... 14

Karlberg v. Otten, Court of Appeals Division 1, Docket Number 64595-1 (April 2, 2012)..... 17

Kinney v. Cook, 150 Wn.App. 187, 208 P.3d 1, 5 (Div. 3, 2009)..... 25

Lutz Tile, Inc. v. Krech, 136 Wn.App. 899, 151 P.3d 219 (2007), *review denied*, 162 Wn.2d 1009, 175 P.3d 1092 (2008)..... 25

Pietz v. Indermuehle 89 Wn.App. 503, 949 P.2d 449, 453 (Wn.App. Div. 2,1998)..... 16

Sharinger v. Kpansky, 156 Wn. App. 1001 (2010)..... 25

Streater v. White, 26 Wn.App. 430, 613 P.2d 187, 191 (1980)..... 24

Taplett v. Khela, 60 Wn.App. 751, 807 P.2d 885 (1991)..... 17

Other Cases

Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227 (1962)..... 17

Knickerbocker Life Ins. Co. v. Norton, 96 U.S. (6 Otto) 234, 24 L.Ed. 689 (1877)..... 14

Washington Statutes

RCW 7.52.010..... 20, 21

RCW 25.04..... 16

RCW 25.04.430..... 17

RCW 26.60.010..... 8

Other Sources

3 Moore, Federal Practice (2d ed. 1948), 15.08, 15.10..... 17

17 WAPRAC § 1.32..... 20

21 WAPRAC § 57.1 Pocket Part..... 8

CR 15(a)..... 17

Jordan, Imposition of Terms and Compensatory Damages in Frivolous Appeals, Wash.State Bar News, May 1980, at 46..... 24, 25

RAP 2.2..... 24

Russell G. Donaldson, Annotation, *When Statute of Limitations Commences to Run on Right of Partnership Accounting,* 44 A.L.R.4th 678, 684 (1986)..... 16

Washington State Bar Ass'n, *Washington Partnership Law and Practice Handbook* § 6.2.2, at 6-3 (1984)..... 17

A. REPLY TO INTRODUCTION

Davern's introduction fails to recognize that in the context of a summary judgment hearing the evidence, and all inferences therefrom, are to be viewed in the light most favorable to the non-moving party. Davern omits from her introduction the nearly yearlong effort of Liddiard to prepare the Utah property for sale as they had mutually agreed. Although Davern claims she discussed the JVA with Liddiard, Liddiard claimed Davern had only mentioned some sort of "will type document" and that he never saw the actual document until just a few minutes before he was urged to sign it quickly. CP (26) at 83.

Davern did not say in either of her declarations that she asked Liddiard to sign an agreement that provided in the event the relationship ended before he contributed labor to constructing a residence on the Washington property he would quit claim it back to her. Davern didn't declare what she and Liddiard discussed about the JVA. She merely said the JVA was "the topic of many conversations" with Liddiard. CP (22) at 71-72. Davern's argument to the contrary is based on improper assumptions not supported by the record.

Davern claims that community property laws cannot override an express agreement, but that is not the issue. Liddiard's claim, and the issue on appeal, is that the circumstances in which the JVA was signed, and the provisions of the JVA should be scrutinized to determine if the JVA is substantively fair and the JVA was entered with procedural fairness.

Davern claims that the presence of a CIR is not before this Court, but the Answer by Liddiard put the issue before the trial court when he alleged the existence of a "meretricious relationship"; alleged that the JVA was unfair both substantively and procedurally; and petitioned that the trial court make an equitable division of the Washington property.

Davern's claim that the Washington property is indisputably Davern's separate property is also inaccurate. Title to the Washington property was, with Davern's knowledge and approval, vested in **both** Davern and Liddiard. The JVA unequivocally states that Davern is owner of 75% and Liddiard is owner of 25% of the "Venture". CP (1) at 10. Liddiard claims that he has an interest in the Washington property based on the agreement with Davern to improve the Utah property for sale and use the proceeds to purchase the Washington property. This agreement has not been disputed by Davern. Liddiard gave adequate consideration for his interest in the Washington property. He contributed approximately a year of labor, materials, and his money to make extensive repairs and improvements to the Utah property.

Liddiard was not recalcitrant and deceptive in his actions. He simply challenged the enforceability of the JVA, with good factual reason, and based on a reasonable extension of applicable law.

B. REPLY TO COUNTERSTATMENT OF ISSUES

1. If the JVA was procedurally and substantively valid, it should be enforceable; but the JVA is unfair both substantively and procedurally, and is therefore invalid.

2. If there are no genuine issues of material fact and the agreement is enforceable, summary judgment is proper; but, here the JVA specifically says that Liddiard and Davern "shall each own" 25% and 75% respectively". The precipitating event that triggered Davern's claim of a right to forfeit Liddiard's 25% interest was the termination of the CIR that she and Liddiard had enjoyed for approximately ten and one half years. CP (26) at 78 and CP (22) at 72. Legitimate issues exist regarding the fairness of this provision, and the circumstances under which the JVA was prepared, presented, explained and signed.

3. The mere fact that the Washington property is the only asset before the Court does not affect the dispute over whether Davern has the right to forfeit Liddiard's interest in the property.

4. An award of attorney fees as a sanction for bad faith should not be upheld absent specific findings of (1) prelitigation misconduct, (2) procedural bad faith, or (3) substantive bad faith. Mere disagreement on the enforceability of the JVA is not obdurate or obstinate misconduct. Whatever mistakes or misstatements may have been made at the trial court level (or in Liddiard's opening brief), they do not rise to the level of bad faith, nor is there any basis to claim that Liddiard's claim has been prosecuted for the purpose of harassment.

C. REPLY TO COUNTERSTATEMENT OF THE CASE

Davern and Liddiard did more than just share space. They were "domestic partners", had a strong relationship, discussed marriage, and made plans to share ownership of property. CP (26) at 78 and 79. The evidence does not state that Davern did not require payment of rent or expenses. The only comment in that respect is Liddiard's statement that he "contributed monetarily and plaintiff GAIL DAVERN applied those funds toward any household expenses as she saw fit; I also bought food periodically." CP (26) at 79.

Liddiard's work on the Utah property was not merely "some repair work" as Davern has characterized the work. The work took over a year to complete and included repairing and repainting the entire interior of the house, re-roofing the entire house and garage, stripping and refinishing the kitchen cabinets, and many other repairs. The repair of the roof on the house **alone** was approximately $38,000.[1] CP (26) at 79-82.

[1] Davern is correct that the evidence filed by Liddiard showed only one building permit was purchased by Liddiard. This author inadvertently and mistakenly wrote "permits" in the opening brief, and failed to notice and make the correction before filing the brief. No intent to mislead counsel or the Court was intended. The permit was introduced at the trial court to corroborate Liddiard's account, but is of little significance otherwise.

Davern's claim that "Because Liddiard intended to contribute significant labor to developing the property, Davern agreed to put Liddiard on the title although he contributed no funds to the purchase" is not supported by the record. She cites her declaration (CP (22) at 71) and Liddiard's response declaration (CP (26) at 82-83), but in neither is there any mention of an agreement to put Liddiard on the title based on "his *future* promised labor in developing the property". Davern attempts to mislead the Court here. She stated in her declaration (CP (22) at 71) merely that she did not want "to buy the Property with my life savings and then place TIM LIDDIARD on title unless I and my children as my heirs were protected in case our personal relationship terminated."[2]

No evidence is before the Court that suggests that Davern and Liddiard negotiated the terms of the JVA, or ever discussed the exchange of putting Liddiard on the title in return for his "*future* promised labor". The claim that there was an agreement between Liddiard and Davern on this point, or that Davern specifically proposed the 75% / 25% division of the property before the JVA was presented to Liddiard, has no basis in the record.[3] In fact, it is more likely the case that Davern and Liddiard both signed the Washington property purchase agreement in recognition of Liddiard's work on the Utah house, and that Davern tried to change the terms with the JVA. If the intention was otherwise, Davern wouldn't have allowed Liddiard's name on the title until the home was constructed.[4]

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[2] This statement is entirely consistent with Liddiard's statement that Davern wanted "to have a will type document that would ensure that her children would receive her part of the property in the event of her death". CP (26) at 83.

[3] Davern claimed that the JVA was the topic of many discussions with Liddiard and that he had "ample time" to consult with an attorney, but she provided no specifics regarding the subjects discussed or the actual time that was available to Liddiard. Her statements are conclusions and not factual statements that support the arguments she makes on appeal.

[4] If Liddiard's name had not been put on the title, and this action for ejectment, Davern's argument that CIR law is not relevant might be persuasive, but in the circumstances here Davern can't dispute that Liddiard and she agreed to put him on the title to the Washington property and he had a recognizable interest in the property.

The JVA was signed in the offices of Davern's attorney five months **after** Davern and Liddiard had signed a purchase contract to purchase the Washington property in both names; and, the JVA was signed on the very day that they were to sign papers so the deed to the property could be recorded.[5] CP (26) at 82.

While not a prenuptial agreement, among other things, the JVA was a property status agreement. It defined the percentage interests of ownership of the Washington property at the time it was signed. The purchase of the Washington property was a major event in the lives of Davern and Liddiard. Davern misrepresented the purpose and intended effect of the JVA, gave Liddiard little or no time to obtain independent attorney review of the JVA, and failed to make a change to the JVA requested by Liddiard. If all inferences are to be given to the non-moving party, the existence of the CIR and the circumstances when the JVA was signed compel a trial. A trial is needed to fully appreciate the nature of the relationship that existed, who had the greater experience and training, who had the stronger psychological will, what level of trust and obedience existed, how were decisions made and plans developed, what plans existed, what were the parties' intentions when the purchase agreement was signed in June 1999, and other related issues.

Davern's claims against Kristin Shauck are not based on the JVA. Shauck made no independent claims, and took no affirmative action. The apparent basis of Davern's claim that Shauck is liable is simply Shauck's failure to do as Davern demanded.

Davern's attorney wrote a letter to Liddiard demanding that he and Shauck sign off on the Washington property. Liddiard's attorney responded for Liddiard. CP (1) at 18-19. Davern then sued both Liddiard and Shauck. Shauck filed her motion for dismissal before the trial court

[5] The record does not reveal exactly what was signed by Davern and Liddiard after they signed the JVA and drove to South Bend. It seems likely that closing escrow instructions, the closing statement, and an excise tax affidavit were signed.

ruled on the motion for summary judgment, and the trial court raised the issue at the hearing, but Davern objected to consideration of Shauck's motion because it had not been properly noted. RP 32. Shauck's motion for dismissal was then heard, after proper notice, on September 16, 2011. Davern presented Findings of Fact and Conclusions of Law (CP (41) at 123-128), but the findings only state that Liddiard failed to sign the quit claim deed after demand. No mention is made of any misconduct by Shauck. In Findings of Fact and Conclusions of Law As To Defendants' Motion to Dismiss Kristin A. Shauck (CP (61) at 201-204), the trial court signed findings stating, at CP (61) at 203, that Shauck "never attempted to properly withdraw from the case until she, as a party defendant, lost the Motion for Order for Summary Judgment". But Shauck did not file a response to the motion for summary judgment or resist the motion.

Davern claimed that the trial court "awarded attorney's fees to Davern under (1) the common law principle of bad faith and (2) an Oregon statutory fee shifting provision that provides for fees for defenses made 'without objectively reasonable basis'," and cited CP 55, 127. CP 55 is a page in Davern's Memorandum In Support of Plaintiff's Motion for Attorney's Fees. CP 127 is a page in the findings of fact proposed by Davern and signed by the trial court that simply states that Liddiard's failure to sign and return the documents to Davern that would transfer his interest in the Washington property to Davern was in bad faith and his defense was made without objectively reasonable basis. The finding is really a conclusion. It did not identify on what basis the trial court concluded that Liddiard's actions were in bad faith, and it did not identify why the trial court found that the defense asserted by Liddiard was without any objectively reasonable basis. To the contrary, the record shows that Liddiard made a good faith challenge of the enforceability of the JVA based on recognized facts and legal principles commonly applicable to transactions between persons planning to marry that Liddiard claimed

should be applied to the transactions between him and Davern because of the CIR that existed between them.

D. REPLY TO DAVERN'S SUMMARY OF ARGUMENT

Davern makes bold statements that the existence of the long term CIR between Davern and Liddiard is immaterial, the JVA was "reasonable and procedurally fair," and that Liddiard was "properly sanctioned for misstating facts and law in an attempt to manufacture a meritless defense to Davern's claim". These statements are not supportable in the record. And this appeal is not frivolous.

E. REPLY TO DAVERN'S ARGUMENT

Davern does not respond to the guidance provided by the Supreme Court in *Vasquez v. Hawthorn,* 145 Wn. 2d 103, 33-.3d 735 (2001) in which the court stated at page 107-108:

> Equitable claims are not dependent on the "legality" of the relationship between the parties, nor are they limited by the gender or sexual orientation of the parties. For example, the use of the term "marital-like" in prior meretricious relationship cases is a mere analogy because defining these relationships as related to marriage would create a de facto common-law marriage, which this court has refused to do. *In re Marriage of Pennington,* 142 Wn.2d 592, 601, 14 P.3d 764 (2000). Rather than relying on analogy, equitable claims must be analyzed under the specific facts presented in each case. Even when we recognize "factors" to guide the court's determination of the equitable issues presented, these considerations are not exclusive, but are intended to reach all relevant evidence. In a situation where the relationship between the parties is both complicated and contested, the determination of which equitable theories apply should seldom be decided by the court on summary judgment.

Instead, she argues that the existence of the over 10 year CIR that she and Liddiard enjoyed is immaterial. Davern's argument is convenient and advantageous to her position, but not consistent with the application of equitable principles that should be applied to the facts here.

Davern also argues that Liddiard failed to raise a "genuine issue of *material* fact for trial on the issue of whether a CIR/meretricious relationship existed between Liddiard and Davern".

Brief of Respondent at 14. This statement ignores the declarations on file by Davern and Liddiard, and the findings presented by Davern, which state that she and Liddiard had a "personal relationship" that included cohabitation, mutual planning and investment, and lasted from early 1993 until October 2003. The evidence before the Court, the inferences of which must favor Liddiard's position, show that the relationship between Liddiard and Davern at the time the JVA was signed was a committed, intimate relationship (CIR) that had been ongoing for over six years. A CIR existed and it affected the duties owed by Davern to Liddiard and Liddiard to Davern.

The Washington legislature has certainly recognized that participants in a CIR are entitled to protection. In the first of its specific findings, the legislature found at RCW 26.60.010 that:

> Many Washingtonians are in intimate, committed, and exclusive relationships with another person to whom they are not legally married. These relationships are important to the individuals involved and their families; they also benefit the public by providing a private source of mutual support for the financial, physical, and emotional health of those individuals and their families. The public has an interest in providing a legal framework for such mutually supportive relationships, whether the partners are of the same or different sexes, and irrespective of their sexual orientation.

Just as the legislature found that the public has an interest in providing a legal framework for such mutually supportive relationships, the law should likewise recognize that participants in a CIR are entitled to the same protection from agreements that are substantively and procedurally unfair property agreements, such as the JVA in this case.[6]

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[6] See also 21 WAPRAC § 57.1 Pocket Part in which Scott J. Horenstein wrote: The laws should be consulted by anyone advising couples who are contemplating entering into or dissolving a domestic partnership because while the law solves a number of problems (for instance, it allows visitation rights in a healthcare facility, allows the same right a spouse enjoys to state health benefits, allows informed consent for medical care, etc.) it does not fully solve the problems inherent in dividing property and debts incurred during a cohabitation relationship. The 2008 legislation directs that Washington's community property laws apply to domestic partnerships at the date of registration and it affects many areas of the domestic partnership relationship, including the dissolution of that relationship and the application of the community property laws thereto and estate planning.

A prenuptial agreement is an agreement made by persons expecting to marry and signed **before they are married**. Davern acknowledges that the *heightened protection* applicable to the scrutiny given to prenuptial agreements extends from the fiduciary relationship spouses owe each other, *Whitney v. Seattle-First National Bank,* 90 Wn.2d 105, 110, 579 P.2d 937 (1978), but she claims that the *heightened protection* available in the context of a prenuptial agreement is not applicable to participants in a CIR. Davern takes this position despite evidence showing there was a high level of mutual trust, a significant disparity of age and sophistication, a total absence of independent review, mutual contributions to the acquisition of the assets, and an express acknowledgment of shared ownership of the asset. Davern's claim is that since not all marriage laws are similarly applied to CIRs, the law provides no *heightened protection* to Liddiard. This position is again convenient for Davern, but not consistent with the reasonable application of equitable principles as required by *Vasquez v. Hawthorne, infra.* The only justifications Davern provides for this position are (1) the community property assumption does not apply to CIRs and (2) a prospective or current spouse can exert influence by refusing to marry or threatening divorce.

Davern gratuitously states that she doesn't intend to "belittle the emotional impact that a threat to end a CIR might have on a person," but she ignores the complications that develop in a long term CIR where one member has expended large amounts of time and money to improve property owned by the other in furtherance of the **mutual plan to jointly acquire a new property** (and one member of the CIR proposes an agreement prepared by an attorney in a neighboring state without giving the other member an opportunity to get separate counsel).

The evidence shows that Liddiard spent a year improving Davern's Utah property so he and Davern could jointly acquire a property in Washington, which they then did. And they

contracted in June 1999 to purchase the Washington property in both of their names, without mention of any joint venture agreement or other agreement that would result in the potential forfeiture of Liddiard's interest in the Washington property if the CIR ended.

Although Davern is correct that *In re Marriage of Hadley,* 88 Wn.2d 649, 652, 565 P.2d 790, 792 (1977) does not hold that a contract signed in the context of a CIR should be examined using the same legal precepts as are applied in agreements between married persons, it does provide guidance. *Hadley* does hold that the Court should apply such legal precepts to property status agreements entered during marriage. Liddiard's claim is that such property status agreements pose no more threat of loss of property, or relationship, than the JVA did to Liddiard in the circumstances in which it was signed.[7] Washington courts should not attempt to create a "bright line" in the protection available under the law between persons planning to marry versus persons in long term CIRs. The purpose of the heightened protection is well recognized, and there are no substantial reasons for denying that protection when the facts show that one member of the CIR is at a recognizable bargaining disadvantage or intentionally uninformed to the extent that the agreement for which enforcement is sought was not entered voluntarily and intelligently. When the wide range of potential circumstances in which disputes over prenuptial, postnuptial, property status agreements during marriage, and property status agreements outside of marriage can arise, and the potential relationship characteristics (sophistication, age, training and education differences, presence or absence of independent counsel, etc.) are considered, imposing a bright line distinction based on intent to marry or actual marriage is unwarranted.

[7] The evidence in the record indicates that Davern sprung the JVA on Liddiard on the very day on which the title to the disputed property was to be received; and Liddiard had invested his time, labor and money in the Utah property with Davern's knowledge and assent so the Utah property would fetch a higher price to enable Davern and Liddiard to purchase the Washington property.

As was recognized in *Vasquez v. Hawthorn,* supra, application of equitable theories should seldom be decided by the court on summary judgment. Likewise, imposition of a hard and fast rule that close scrutiny of property status agreements, such as the JVA in this case,[8] will not be applied absent evidence of an intent to marry is not necessary or appropriate. Trial courts are fully capable of determining whether a CIR existed, the significance of the CIR when the property status agreement was entered, and of applying the heightened scrutiny applicable to premarital agreements. (It is conceivable that a document like the JVA could be entered in anticipation of a marriage that is later cancelled. In such circumstances, presumably heightened scrutiny of the agreement would be applied. The difference between such circumstances and the present circumstances is not sufficient to warrant the lower scrutiny claimed by Davern.)

Davern attempts to avoid this analysis by claiming the JVA is simply a contract and must be shown to have been procedurally or substantively unconscionable. Brief of Respondent at 16-17. But Liddiard claimed at the trial court, and is claiming here, that the JVA is unfair both procedurally **and** substantively, and should be invalid. If the JVA is subject to heightened scrutiny, the summary judgment orders and attorney fee awards should be reversed, and Davern's arguments that the JVA is not unconscionable are inapposite.

Much of Davern's arguments regarding whether the JVA is unconscionable are interpretations of the facts stated in the declarations on file and are contrary to the inferences that Liddiard is entitled to receive in a de novo review of the summary judgment orders. For instance, on page 19 of Brief of Respondent, Davern criticizes Liddiard's argument that Davern's late disclosure of the JVA was oppressive because Davern didn't threaten "to refuse to sign the closing documents, or impose any other negative consequence upon him if he refused to sign".

[8] Davern claims a right to forfeit Liddiard's interest in the property on the basis that it is her separate property because it was purchased solely with her funds. In essence, Davern claims the JVA established the status of the property as her separate property, a claim that Liddiard disputes.

Davern made no such statement in her declarations. Liddiard stated that he didn't understand the JVA, and he wasn't given opportunity to get legal counsel, and was deceived into signing the JVA under false pretenses. Liddiard is entitled to the inferences that can be drawn from the fact that he was told Davern wanted to sign a "will type document" at Davern's attorney's office in Oregon, she didn't provide Liddiard with a copy until just before he was urged to sign, Liddiard didn't understand the JVA, and Liddiard didn't have independent counsel. It is reasonable to infer from these facts that Davern **did** "shrewdly" plan to spring the JVA on Liddiard on the very day that the title to the Washington property would be conveyed to Davern and Liddiard, possibly the last date on which the closing could occur before the purchase contract terminated.[9] Liddiard was justifiably concerned that Davern might not complete the purchase of the Washington property and thereafter terminate not just the CIR, but also Liddiard's ability to recover his "investment" of time, labor and money in improving the Utah property (which he contributed so he and Davern could complete their plan to acquire the Washington property).

Davern claimed at page 20 of Brief of Respondent that "She had already bought the property with him (Liddiard) in June, and instructed the seller to put him on the Statutory Warranty Deed in early November." In support of this statement she cited the deed itself and the Land Form Real Estate Purchase and Sale Agreement (hereafter referred to as the "REPSA"), but **neither** document supports her claim that she gave the seller any instructions at all. The deed contains no indication of any instructions from Davern, and the REPSA was signed in June 1999. There is nothing on the REPSA indicating any further instruction by Davern to the seller regarding the names to be put on the Statutory Warranty Deed. To the contrary, the REPSA was

[9] The Land Form Real Estate Purchase and Sale Agreement, which is an exhibit to Liddiard's Affidavit in Response to Motion for Summary Judgment, CP (26) at 86-88, appears to state that the closing was to occur by "Nov. 1, 1999", but the legibility is poor and it may actually state "Dec. 1, 1999." What is clear is that Davern and Liddiard understood it was urgent to get to South Bend to sign the documents needed to record the deed.

entered in both names and both names would have been put on the Statutory Warranty Deed unless Davern refused to consummate the sale and fulfill the plan that she and Liddiard had jointly made and pursued for over a year. Liddiard understandably felt pressure and coercion. He was **not** on the title to the Washington property until the deed was recorded, which Liddiard could have reasonably concluded would not have happened if Liddiard did not sign the JVA. Davern's arguments to the contrary are not supported by the facts in the record, and are clearly contrary to the rule requiring that the facts be considered in the light most favorable to the non-moving party. *Wilson v. Steinbach,* 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The date on which the seller signed the Statutory Warranty Deed is not evidence of any instruction by Davern or Liddiard, or even that the deed was available before Liddiard and Davern went to the assessor's office on the day the JVA was signed.[10]

Davern's arguments about the JVA being substantively valid and fair are also inaccurate unless the time, labor and money Liddiard spent renovating the Utah property, **pursuant to the mutual plan of Davern and Liddiard** to renovate and sell the Utah property to raise money to move to Washington, are ignored. Davern argues that the purchase money came from Davern's separate property, but in reality the money came from property owned by Davern but renovated by Liddiard pursuant to their agreed plan to purchase a new home site in Washington in both of their names, which is exactly what happened. Liddiard completed his contribution to the purchase of the Washington property, and the Utah property was sold, before the JVA was even prepared.[11] Davern tried to cover up or eliminate Liddiard's contributions to their mutual plan by hiring an attorney in Oregon to draw up a one-sided agreement that would enable her to **forfeit**

[10] The property purchase agreement, although in places illegible, does contain indication that the closing of the purchase by Davern and Liddiard was to occur through a "qualified closing agent" or "Pacific Cty Title". CP (26) at 84. It is highly unlikely that Davern would have received the Statutory Warranty Deed prior to recording if a qualified closing agent was involved.

[11] Closing of the purchase of the Washington property was contingent on sale of the Utah property. CP (26) at 84.

Liddiard's interest by simply not agreeing to spend any money on construction of a home on the property, which is apparently what she did.[12]

Davern's characterization of Liddiard's requested correction to the JVA as "the critical provision" is also improper. Liddiard requested the change of the one provision he understood and which he saw was inaccurate. The claim that it was the "critical provision" of the JVA ignores the fact that Liddiard was not represented and had no understanding of the effect of the JVA on his interests, in particular that his interests in the Washington property could be forfeited if Davern chose not to proceed with construction.

Even if the JVA is determined at trial to be valid, the Court would also be asked to determine why Davern refused to build, and whether forfeiture of Liddiard's 25% ownership of the Washington property is just in the circumstances. "Forfeitures are not favored in the law. They are often the means of great oppression and injustice." *Knickerbocker Life Ins. Co. v. Norton,* 96 U.S. (6 Otto) 234, 242, 24 L.Ed. 689 (1877). Cited with approval in *State v. Martin,* 137 Wn.2d 149 (FN1 at 160), 969 P.2d 450 (1999).[13]

Davern's argument that Liddiard failed to raise a genuine issue of material fact that the JVA was unconscionable fails if recognition is given to the plan that Davern and Liddiard formed to renovate the Utah house to raise money to buy the Washington property. And if it is recognized, the forfeiture of Liddiard's 25% interest in the property (as expressly acknowledged

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[12] Even if Liddiard had billed Davern for the work he did on the Utah property, and Davern agreed that Liddiard would receive an interest in the Washington property in lieu of payment, the result should be the same.

[13] Davern tries to skirt the forfeiture aspect of the JVA by claiming Liddiard failed to sue for "contribution". But Liddiard did ask the court to find the JVA invalid and make an "equitable division of the property". And see *In re Long and Fregeau,* 158 Wn.App. 919, 929, 244 P.3d 26, 31 (Wn.App. Div. 3, 2010) where the court observed: "We presume any increase in value of separate property is likewise separate in nature. *In re Marriage of Lindemann,* 92 Wn.App. 64, 69, 960 P.2d 966 (1998), (citing *In re Marriage of Elam,* 97 Wn.2d 811, 816, 650 P.2d 213 (1982)). However, "if the court is persuaded by direct and positive evidence that the increase in value of separate property is attributable to community labor or funds, the community may be equitably entitled to reimbursement for the contributions that caused the increase in value." *Id.* The labor of each party during a committed intimate relationship is community labor. *Id.*at 72, 960 P.2d 966."

in Article V of the JVA) is unconscionable. As was recognized in *John R. Hansen, Inc. v. Pacific Intern. Corp.*, 76 Wn.2d 220, 228, 455 P.2d 946, 951 (1969):

> It is elementary law in this jurisdiction that forfeitures are not favored and never enforced in equity unless the right thereto is so clear as to permit no denial. *Dill v. Zielke*, 26 Wn.2d 246, 173 P.2d 977 (1946); *Moeller v. Good Hope Farms, Inc.*, 35 Wn.2d 777, 215 P.2d 425 (1950); *State ex rel. Foley v. Superior Court*, 57 Wn.2d 571, 358 P.2d 550 (1961); *Hyrkas v. Knight,* 64 Wn.2d 733, 393 P.2d 943 (1964); *Rocha v. McClure Motors, Inc.*, 64 Wn.2d 942, 395 P.2d 191 (1964).

Liddiard presented sufficient evidence to establish a basis to claim that forfeiture of his 25% interest in the Washington property should not be permitted, and his request that the trial court make an equitable division of the property adequately put the issue before the court.

The evidence presented demonstrates that there are genuine issues of material fact and summary judgment in favor of Davern was improper.

1. DAVERN'S COMPLAINT WAS FILED AFTER THE STATUTE OF LIMITATIONS EXPIRED

Davern attempts to also mislead the court by characterizing the JVA as a "contract" for which no cause of action arose until there was a breach, which purportedly did not occur until Liddiard "refused to sign the quit claim deed as Davern requested under the terms of the JVA". Brief of Respondent at 28. Assuming the JVA is enforceable, Davern's rights under the JVA could have been enforced immediately after the "breakup of the personal relationship"[14] between Davern and Liddiard occurred, which Davern acknowledged occurred in 2003. CP (1) at 4.

Davern acknowledges that "Usually, a cause of action accrues when an injured party has the right to apply to a court for relief," Brief of Respondent at 27, but she then asserts that accrual did not commence until Liddiard refused to sign the quit claim deed. No provision in the JVA required Davern to make demand on Liddiard that he sign over the Washington property before she commenced suit against him. She makes the leap from recognizing that a cause of

[14] Section 10.01(c) of the JVA, CP (1) at 11.

action accrues when a party has the right to apply to a court for relief to her claim that there was no breach until Liddiard failed to sign the quit claim deed without any supporting legal authority.

The facts establish that a CIR existed and, if the JVA is enforceable, a joint venture was created.[15] Partnership law generally applies to joint ventures. See *Pietz v. Indermuehle* 89 Wn.App. 503, 510, 949 P.2d 449, 453 (Wn.App. Div. 2,1998), where the court observed:

> The purpose of a joint venture is similar to a partnership but it is limited to a particular transaction or project. Consequently, partnership law generally applies to joint ventures as well. *Paulson v. McMillan,* 8 Wn.2d 295, 298, 111 P.2d 983 (1941).

If it was enforceable at all, the JVA was enforceable when the joint venture terminated, which, by the express terms of the JVA, occurred when the "personal relationship" between Liddiard and Davern terminated in 2003. At that time, Liddiard could have prosecuted a claim for his "out-of-pocket expenses and his labor in the improvement of the real property", and Davern could have sued to compel Liddiard to "execute, acknowledge and deliver" documents to transfer the Washington property back to Davern. Most important, the JVA provided that the "Joint Venture shall be **dissolved** upon the happening" of the breakup of the personal relationship of the parties. CP (1) at 11.

Washington courts have addressed when a cause of action for accounting on a partnership accrues. In *Malnar v. Carlson*, 128 Wn.2d 521, 529-530, 910 P.2d 455, 459 (1996) the court said:

> Washington cases hold that partnerships are presumed to continue until evidence shows dissolution has occurred. *Alaska Banking & Safe Deposit Co. v. Simmons,* 67 Wn. 673, 678, 122 P. 319 (1912); *see Carstens v. Earles,* 26 Wn. 676, 694, 67 P. 404 (1901). In an action for an accounting of the affairs of a partnership, the time of accrual is governed by the Uniform Partnership Act. RCW 25.04. *See also* Russell G. Donaldson, Annotation, *When Statute of Limitations Commences to Run on Right of Partnership Accounting,* 44 A.L.R.4th

[15] It can also be argued that a joint venture was created when Liddiard and Davern agreed to renovate and sell the Utah property and use the sale proceeds to purchase property in Washington in both of their names.

678, 684 (1986). **In Washington, a cause of action for the accounting of a partnership interest accrues at "dissolution**." RCW 25.04.430 provides:

> The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, **at the date of dissolution**, in the absence of any agreement to the contrary. *See also Taplett v. Khela,* 60 Wn.App. 751, 754-58, 807 P.2d 885 (1991) (under RCW 25.04.430, the right to a partnership accounting accrues at dissolution); Washington State Bar Ass'n, *Washington Partnership Law and Practice Handbook* § 6.2.2, at 6-3 (1984). (Emphasis added.)

Contrary to Davern's argument, according to its express terms, the JVA terminated in 2003 when the "personal relationship" between Liddiard and Davern terminated. The JVA makes no mention of a requirement for any written demands prior to enforcement of any rights under the JVA. Davern's rights, if any, under the JVA accrued in 2003. Liddiard's motion to amend to allow the affirmative defense of violation of the statute of limitations was not futile and, given the clear application of the statute, the trial court's denial of Liddiard's motion was an abuse of discretion.

The motion to amend was "tardy", but it did not impose an undue prejudice on Davern. CR 15 (a) provides that leave to amend shall be "freely given when justice so requires." This clause was discussed in *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227 (1962)[16] where the court noted:

> Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.-the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant

[16] Cited with approval in *Karlberg v. Otten*, Court of Appeals Division 1, Docket Number 64595-1 (April 2, 2012).

> the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

The trial court denied the motion to amend and entered Findings and "Discussion" regarding its decision, which were prepared by Davern. CP (62) 205-209. Of interest is the apparent confusion that existed regarding the potential effect of the statute of limitations on Davern's claims. The trial court's discussion indicates that the trial court concluded that Oregon law applied even if the statute of limitations defense was allowed and barred enforcement of the JVA. However, if the JVA is unenforceable, then the forum selection clause is not enforceable and Oregon law does not apply. The trial court's primary basis for denying the motion to amend was based on an error of law. It is not clear what the trial court would have ruled had it not been under the mistaken impression that Oregon law would apply even if the JVA was unenforceable.

2. DAVERN'S ARGUMENTS ON APPLICATION OF CIR/MERTRICIOUS RELATIONSHIP LAWS IS INAPPOSITE

This appeal is of a summary judgment order, which was entered despite (a) credible evidence that a CIR between Liddiard and Davern existed; (b) the parties had jointly planned and entered a contract for the purchase of the subject property; (c) on the very day that the purchase of the property was to close, the JVA was signed in circumstances that were not procedurally fair; and (d) Davern was seeking to forfeit Liddiard's interest in the property pursuant to the JVA despite the fact that the JVA was substantively unfair. Davern argues that even if the JVA is unenforceable Davern owns the property as her separate property, but that determination is not proper on summary judgment, and **was not considered by the trial court**. Davern's motion for summary judgment was based entirely on the JVA and application of Oregon law. If the JVA is unenforceable, Washington law would apply. The trial court did not consider whether Liddiard

was entitled to partition under Washington law. Much evidence that was not submitted to the trial court in the summary judgment proceedings will be presented if a trial is conducted.[17]

If the summary judgment is reversed and the JVA is determined to be unenforceable, Liddiard and Davern remain the holders of the title to the Washington property. Then, rather than Liddiard having the burden to show that he has an interest in the property, the burden is on Davern to establish that Liddiard has no interest in the property. The trial court simply held the JVA enforceable and did not consider the application of CIR law to the division of the Washington property. Davern's argument that even if the JVA is unenforceable Liddiard could not prevail under CIR laws is not proper in this appeal.

Davern's argued that applying the law applicable to property acquired during a CIR directs the conclusion that the Washington property is solely her property. Davern filled several pages with argument about the facts and inferences in favor of Davern, to which she is not entitled. On page 32 of Brief of Respondent, Davern acknowledged that "when funds or services owned by both parties are used to increase the equity or to maintain or increase the value of property that would have been separate property had the couple been married," a right of reimbursement in the "community" may exist.[18] This concession alone is enough to defeat Davern's argument. Liddiard presented sufficient evidence to show that he contributed labor and money to increase the value of the Utah property. He is entitled to his day in court on the subject.

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[17] For instance, Liddiard would present evidence of the amount of proceeds that were received from the sale of the Utah property, what proceeds remained after the purchase of the Washington property, what efforts were made to commence construction of a residence (the record shows that Liddiard stored materials on the Washington property, some of which were likely expected to be used in construction of the residence), what prevented commencement of the construction, what divisions of property occurred when the parties separated, and so on.

[18] Davern criticizes Liddiard's pleadings and claims that Liddiard waived his right to "contribution" or "reimbursement", and that his claims are time barred, but the fact remains that he is on the title to the property and if the JVA is invalid, the proper remedy for either Liddiard or Davern is partition of the title.

Despite Davern's argument that Liddiard waived any right for "contribution", the fact is that Liddiard received title to the Washington property with Davern, and remained on the title to the property for over ten years before Davern commenced this action. In such circumstances, partition is an appropriate remedy. RCW 7.52.010 provides:

> When several persons hold and are in possession of real property as tenants in common, in which one or more of them have an estate of inheritance, or for life or years, an action may be maintained by one or more of such persons, for a partition thereof, according to the respective rights of the persons interested therein, and for sale of such property, or a part of it, if it appear that a partition cannot be made without great prejudice to the owners.

And at 17 WAPRAC § 1.32 it is observed that:

> A final accounting among the co-tenants is a part of a partition action. Something has already been said of this. A co-tenant may recover any sums that could be recovered in an accounting in a contribution action, principally the other co-tenants' prorata shares of money the co-tenant has paid beyond his share for taxes, mortgage debt payments, and necessary repairs. In addition, according to the rule in most American jurisdictions, sums paid for improvements may be recovered to the extent they enhanced the land's value only in a partition action, not in a contribution action.

Liddiard asked the trial court to "Determine that defendants have an interest in the subject property, and make an equitable division of said property." This prayer was sufficient to give notice to Davern that Liddiard sought a review of the contributions made by Liddiard to the renovation of the Utah property and an equitable division of the Washington property. It was not necessary for Liddiard to specifically pray for partition. See *Adams v. King County*, 164 Wn.2d 640, 657, 192 P.3d 891, 900 (2008), where the court noted:

> The complaint simply must give sufficient notice to the defendant of the nature of the claim being brought. *Lightner v. Balow,* 59 Wn.2d 856, 858, 370 P.2d 982 (1962) ("[P]leadings are primarily intended to give notice to the court and the opponent of the general nature of the claim asserted."). We liberally construe pleading requirements in order "to facilitate proper decision on the merits, not to erect formal and burdensome impediments to the litigation process." *State v. Adams,* 107 Wn.2d 611, 620, 732 P.2d 149 (1987).

Liddiard's Answer adequately informed Davern and the trial court that Liddiard sought an equitable division of the Washington property, which is what the court is called to do in a partition. In *Carson v. Willstadter*, 65 Wn.App. 880, 883, 830 P.2d 676, 678 (1992), the court observed:

> Partition of property owned in common is an **equitable remedy** in which the court has great flexibility in fashioning relief. *Leinweber v. Leinweber,* 63 Wn.2d 54, 385 P.2d 556 (1963). Partition may occur "according to the respective rights of the persons interested therein ..." RCW 7.52.010. (Emphasis added.)

Davern's argument that Liddiard failed to counterclaim for distribution of assets from the CIR or for contribution are also misplaced. Liddiard contested the validity of the JVA, and the trial court granted summary judgment against him on that point and enforced the JVA. If the JVA is invalid, Liddiard's Answer put Davern and the trial court on sufficient notice of his claim that he asserted an equitable claim in the Washington property. He was not obligated to do more. Davern provided no authority to the contrary.[19]

3. IF THE JVA IS NOT ENFORCEABLE, OREGON LAW IS NOT RELEVANT

Davern makes considerable effort to show that Oregon law supports the trial court's decision to grant summary judgment, but the argument is irrelevant if the JVA is not enforceable. The only basis to apply Oregon law in this case is the JVA. Since the parties resided in Washington and the property is in Washington, Washington law should apply to determine the validity of the JVA, and the division of the property if the JVA is invalid. These arguments were not presented to the trial court and should not be considered on appeal. *See Herberg v. Swartz,* 89 Wn.2d 916, 925, 578 P.2d 17 (1978) ("An issue, theory or argument not presented at trial will not be considered on appeal.").

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[19] Davern's claim that even if Liddiard's claim included a right of reimbursement, his equitable interest would be $19,000 and subject to reduction for the benefit of living rent free for seven years, ignores other evidence that would be presented at trial, such as evidence of the amount that Davern's mortgage debt on the Utah property was reduced during the seven years the parties lived together in Utah.

4. THE AWARD OF ATTORNEY FEES WAS IMPROPER

Davern acknowledges that an award of attorney fees must be reversed when the "record fails to state a basis supporting the award" and "a trial court must enter specific findings of bad faith in order to support an award of attorney fees." The only basis Davern can point to for the finding of bad faith is the claim that Liddiard "acted in bad faith, specifically, by refusing to abide the JVA, and then by raising a defense in the trial court that had no 'objectively reasonable basis'." Brief of Respondent at 39. Davern claims that "Liddiard's stated basis for refusing to quit claim the property, that the property was not purchased using Davern's sole funds, was expressly contradicted by the JVA and his own admissions". Brief of Respondent at 39. Davern's claims are overstated and unsupportable.

No showing or argument has been made that Liddiard acted for any improper purpose. Since Liddiard was voluntarily put on the title to the Washington property with Davern's knowledge, had he simply not responded to the Summons and Complaint there is no authority under which Davern could have recovered attorney fees and costs since the JVA does not provide for recovery of attorney fees in claims between the parties.[20] However, Liddiard did respond and asserted that he held a valid interest in the property based on legitimate facts that are not disputed by Davern. Rather, Davern disputes what Liddiard believes is, or should be, the law regarding the rights of a CIR participant to contest a contract entered by the participants during the CIR. Liddiard's claims are well grounded in fact and reasonable in the current state of the

[20] There is no basis for recovery of fees against Shauck because she did not sign the JVA and was under no duty to sign the quit claim deed.

law relative to CIRs. There is no evidence that Liddiard or Shauck's claims are interposed for any improper purpose.[21]

Davern claims Liddiard made "blatant misrepresentations". Brief of Respondent at 40. But the record is to the contrary. Davern's twist of the facts is that since the purchase and sale agreement was signed in June, "Liddiard was already listed on the Statutory Warranty Deed on title." This statement is confusing and false. There is no evidence indicating that Davern or Liddiard saw the Statutory Warranty Deed until after it was recorded, nor that they knew the seller had signed the Statutory Warranty Deed when the JVA was signed. The only evidence is that Davern and Liddiard had to go to South Bend on the very day the JVA was presented and signed. The inference is clearly that the JVA was presented on the very day that the purchase closed, and that Davern held the check to pay the purchase price. Davern's claim that Liddiard failed to show any "real pressure to sign" is an argument on the facts and further illustrates why a trial is necessary.

Liddiard's post summary judgment motions were not improper or without factual and legal basis. The motion to amend to allow the affirmative defense that the statute of limitations bars enforcement of the JVA is well based in law and clear authority exists for the trial court to have granted the motion. Although the motion to dismiss Shauck was not properly noted for hearing with the motion for summary judgment, the prosecution of the motion after the summary judgment hearing was not improper because Shauck's position did not change. She had not signed the JVA, was not the addressee on the letter from Davern's attorney, she was under no duty to respond, and she claimed no interest in the Washington property.

[21] Liddiard has married Shauck and no evidence supports any argument that Liddiard is attempting to punish or disturb Davern in any way. Rather, in essence, Liddiard claims that forfeiture of his interest in the Washington property is unreasonable and unfair.

And Liddiard did not misrepresent the circumstances when the JVA was signed. Davern and Liddiard arrived at the "assessor's office just a couple of minutes before they closed". CP (26) at 83. The fact that the auditor's office, a separate agency from the assessor's office, recorded the deed the next day does not prove that Liddiard's representation was false. Davern didn't so state in her reply affidavit. Davern's argument in her response brief is without a factual basis in the record.

5. DAVERN IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES ON APPEAL

Davern's claim that she is entitled to recover fees on appeal is without basis. Liddiard's opening brief is well grounded in the facts presented to the trial court, **and** in law. Rather than repeat those arguments here, it is enough to say that Davern's chastising and disdainful argument is unreasonable, without legitimate basis, and unbecoming. Liddiard has a legitimate right to seek redress from the trial court's rulings that have the effect of forfeiting his interest in the Washington property and awarded fees improperly.[22]

The standards for determining whether to award attorney fees on appeal are well established. In *Streater v. White*, 26 Wn.App. 430, 434-435, 613 P.2d 187, 191 (1980), the court stated:

> In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal. See Jordan, Imposition of Terms and

[22] Liddiard's opening brief cited to the correct documents by reference to the Clerk's docket number. Since there were only three factual affidavits considered by the trial court, presumably the burden on counsel of finding the correct page was not substantial.

Compensatory Damages in Frivolous Appeals, Wash.State Bar News, May 1980, at 46.

And in *Kinney v. Cook,* 150 Wn.App. 187, 195, 208 P.3d 1, 5 (Div. 3, 2009)[23] the court observed:

> "An appeal is frivolous if, **considering the entire record**, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal." *Lutz Tile, Inc. v. Krech,* 136 Wn.App. 899, 906, 151 P.3d 219 (2007), *review denied,* 162 Wn.2d 1009, 175 P.3d 1092 (2008). Further, **all doubts as to whether an appeal is frivolous are resolved in favor of the appellant.** *Id.* (Emphasis added.)

Rather than lashing back at Davern's argument by pointing to the several erroneous factual and legal arguments she made in her brief, it is enough to say that when the record is considered **as a whole**, the criticisms made by Davern of Liddiard's opening brief are without substance.

F. CONCLUSION

Liddiard sought the advice of counsel and thereafter reasonably asserted his claim that the JVA he signed with Davern was invalid because it was unfair both substantively and procedurally. Washington law on the subject is not clear. Liddiard, in good faith, and based on reasonable factual and legal considerations, asserts that the JVA should be reviewed using such standards, and should be invalid. The summary judgment orders should be reversed and the matter remanded for the trial court to reconsider the motion to amend, and the award of attorney fees should be reversed and no attorney fees should be awarded in this appeal.

Respectfully submitted: OLSON ALTHAUSER SAMUELSON & RAYAN, LLP
Attorneys for Appellants Liddiard and Shauck

T. Charles Althauser, WSBA #6863
Date: April 18, 2012.

[23] Cited with approval in *Sharinger v. Kpansky,* 156 Wn. App. 1001 (2010).

No. 42657-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GAIL DAVERN, an unmarried person, **Respondent,** **vs.** **TIM LIDDIARD and KRISTIN A. SHAUCK, husband and wife,** **Appellants.**	**DECLARATION OF SERVICE**

I, CINDY ABBOTT, declare as follows:

That I am now and at all times herein mentioned was a citizen of the United States of America and a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above action and competent to be a witness therein.

That I am an employee with the firm of Olson Althauser Samuelson & Rayan, LLP, P.O. Box 210, 114 West Magnolia, Centralia, Washington 98531.

That on April 18, 2012, I served, by U.S. First Class Mail, *Appellants' Reply Brief* (second corrected) on the following:

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The foregoing statements are made under penalty of perjury under the laws of the State of Washington and are true and correct. Signed at Centralia, Washington, on April 18, 2012.

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